APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

—v.—

LEROY LOETHER and MARIANE LOETHER, his wife, and MRS. ANTHONY PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 26, 1973
CERTIORARI GRANTED JUNE 11, 1973

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Chronological List of Relevant Docket Entries

November 7, 1969	Plaintiff's complaint filed in the U.S. District Court for the Eastern District of Wisconsin.
November 17, 1969	Temporary restraining order granted.
November 17, 1969	Plaintiff's motion for a preliminary injunction filed.
November 20, 1969	Preliminary injunction granted after hearing.
December 2, 1969	Defendant's answer filed.
December 19, 1969	Order granting preliminary injunction filed.
January 5, 1970	Pre-trial conference.
February 10, 1970	Pre-trial order filed.
April 30, 1970	Hearing on defendant's motion for a jury trial.
May 7, 1970	Pre-trial order filed.
May 19, 1970	Opinion and order of the District Court denying jury trial.
June 15, 1970	Plaintiff's statement of uncontested facts and plaintiff's statement of contested facts filed.
June 22, 1970	Status conference.
July 6, 1970	Pre-trial order.
October 26 and 27, 1970	Trial.
January 5, 1971	Defendants' notice of appeal filed.

Complaint, filed November 7, 1969

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

CASE NO. 69-C-524

JULIA ROGERS,

Plaintiff,

—v.—

LEROY LOETHER, AND MARIANE LOETHER, HIS WIFE, AND MRS. ANTHONY PEREZ,

Defendants.

Now comes the plaintiff, Julia Rogers, by her attorneys, Milwaukee Legal Services by Seymour Pikofsky, and respectfully represents to this Honorable Court as follows:

1. That this proceeding is brought under Title 42, Sections 3601-3631, United States Code, as hereinafter more fully appears.

2. That plaintiff is a United States citizen and a citizen of the Eastern District of Wisconsin residing therein at 3160 North 1 Street, in the City and County of Milwaukee.

3. That defendants LeRoy Loether and Mariane Loether, his wife, are adult citizens of the United States and the Eastern District of Wisconsin, residing therein at W142 N7124 Oakwood Drive, in the City of Menomonee Falls.

4. That the defendant Mrs. Anthony Perez, is an adult citizen of the United States and the Eastern District of

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Wisconsin, residing therein at 2527 North Fratney Street, in the City and County of Milwaukee.

5. That the defendants, LeRoy and Mariane Loether have been and are now the owners of a certain duplex located at 2527-2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin, within the jurisdiction of this Court, said property being described as follows:

Barber and Platto's Subdivision in the South West One Quarter (¼), 16-7-22, Lot Four (4), North One Half (½), Lot Five (5).

6. That said defendant Mrs. Anthony Perez occupies the lower half of said duplex and was empowered by defendants, LeRoy Loether and Mariane Loether, his wife, to show the upper half to prospective tenants.

7. That for the last several weeks, plaintiff Julie Rogers has been confined to the hospital.

8. That plaintiff requested a friend of hers, to-wit, Jacqueline Haessly, to look for an apartment for her and her family.

9. That on Thursday, October 30, an ad appeared in the Classified Section of the Milwaukee Journal offering for rent the upper half of the duplex located at 2527-29 North Fratney Street, in Milwaukee, Wisconsin.

10. That Miss Haessly contacted defendant, Mrs. Anthony Perez and made arrangements to see the apartment.

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11. That Miss Haessly informed Mrs. Perez that she was looking at the apartment for a friend of hers who was in the hospital at the time.

12. That Miss Haessly informed Mrs. Perez that she would take the apartment and was informed by Mrs. Perez that the Loethers would have to make the final decision and that they would be coming over that evening.

13. That Miss Haessly asked if Mrs. Perez would take a deposit then and there.

14. That Mrs. Perez then called Mrs. Loether and explained the situation to her and Miss Haessly then spoke to Mrs. Loether.

15. That Mrs. Loether asked Miss Haessly various questions regarding the size and status of the family to be living there and that Miss Haessly gave her all the information requested.

16. That Mrs. Loether then told Miss Haessly that she would accept a $50.00 deposit and Miss Haessly gave to Mrs. Perez her check for the deposit.

17. That subsequent to the acceptance of the deposit, Mrs. Loether called plaintiff at the hospital to talk with her.

18. That subsequent to her conversation with plaintiff herein, Mrs. Loether called Miss Haessly and told her that she understood plaintiff herein was of the Negro race and that Miss Haessly had failed to inform her of this.

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19. That Mrs. Loether then stated to Miss Haessly that she would discuss the possible rental of the apartment to Mrs. Rogers with defendant, Mrs. Perez and her husband.

20. That Miss Haessly then discussed the matter with the Perez' who said that the decision would have to be the Loether's.

21. That Miss Haessly called Mrs. Loether back and informed her that the Perez' had no objection and that it would be up to the owners.

22. That Mrs. Loether informed Miss Haessly that they would still have to talk it over that night and that they would let Mrs. Rogers know.

23. That subsequent to that time Mrs. Loether informed plaintiff herein that they were not going to rent the apartment but were going to keep it vacant.

24. That Miss Haessly is Caucasian.

25. That Mrs. Rogers is Negro.

26. That contrary to Title 42, Section 3604, United States Code, defendants have discriminated against plaintiff in the terms, conditions, and privileges of rental of a dwelling because plaintiff is a Negro.

27. That contrary to Title 42, Section 3604 United States Code, defendants have refused to negotiate for and have otherwise made unavailable a dwelling to plaintiff because she is a Negro.

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28. That plaintiff is informed and believes that unless restrained by this Honorable Court, the defendants will continue to violate Section 3604, Title 42, of the United States Code in the manner herebefore alleged.

WHEREFORE, plaintiff demands judgment against the aforesaid defendants in the sum of $1,000.00 punitive damages, together with costs and disbursements of this action, that the defendants be directed to abide by their agreement to rent the above described premises to the plaintiff; that a temporary Restraining Order be granted restraining the defendants as prayed hereinbefore, since, as shown by the attached Affidavit, immediate and irreparable injury and damage will result to the plaintiff; that the defendants be enjoined and restrained as herein prayed during the pendency of this action; and that the Court grant what ever other and further relief as it may deem just and proper.

/s/ JULIA ROGERS
Julia Rogers

SEYMOUR PIKOFSKY
Attorney for Plaintiff
Milwaukee Legal Services
2218 North Third Street
Milwaukee, Wisconsin 53213
Tel: 372-7400

Affidavit of Jacqueline Haessly, filed November 7, 1969

STATE OF WISCONSIN,
MILWAUKEE WISCONSIN, *ss.:*

MISS JACQUELINE HAESSLY, being first duly sworn, on oath deposes and says:

1. That she is a citizen of the United States residing in the City of Milwaukee , Wisconsin, within the jurisdiction of this Court.

2. That she is Caucasian.

3. That she is a friend of the Plaintiff herein, Julie Rogers.

4. That plaintiff herein asked your affiant to attempt to find an apartment for her since she was confined to the hospital at the time.

5. That on October 30, 1969, affiant observed an advertisement in the Classified Section of the Milwaukee Journal offering for rent the upper half of a duplex located at 2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin.

6. That on October 30, 1969, your affiant spoke with Mrs. Anthony Perez about the apartment and later that day went to see it and was shown it by Mrs. Perez.

7. That on October 30, 1969, your affiant spoke with Mrs. LeRoy Loether one of the owners, of the building and arranged with her to accept a deposit on the property, informing her that she was acting in behalf of a friend of hers, to-wit, the plaintiff herein.

Affidavit of Jacqueline Haessly, filed November 7, 1969

8. That your affiant gave to Mrs. Loether the phone number of the plaintiff herein.

9. That after Mrs. Loether accepted the deposit of $50.00 on the premises hereinbefore described, she called plaintiff herein and discovered that the person to occupy the premises was of the Negro race.

10. That subsequent to the conversation with plaintiff herein, Mrs. Loether telephoned your affiant and stated to her that she had not told her that she was renting it for a Negro and that she did not know if they could rent it on that basis.

/s/ JACQUELINE HAESSLY
Jacqueline Haessly

Subscribed and sworn to before
me this 6th day of November, 1969.
SEYMOUR PIKOFSKY
Notary Public, Milwaukee County, Wisconsin
My Commission is permanent.

Affidavit of Mariane Loether, filed November 17, 1969

MARIANE LOETHER, being duly sworn, deposes and says:

1. I am the wife of Leroy Loether and my husband and I are the joint owners of the duplex and property located at 2527-2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in opposition to the plaintiff's motion for a temporary restraining order.

2. I have never refused to rent the aforesaid property to any person, including the plaintiff, because of their race, color, religion, or national origin. Upon being advised by the plaintiff in a telephone conversation on October 30, 1969, that she was a Negro, I told her that her race would not make any difference in the rental of the property to her. On October 31, 1969, I visited the plaintiff in the hospital and repeated that the decision to rent the property would not be made with reference to the race of any applicant, including herself.

3. The monthly rental for the three-bedroom unit of the duplex in question is one hundred and ten dollars ($110.00) a month. This same monthly rent is being paid by the occupants of the other unit at the duplex.

Dated at Milwaukee, Wisconsin, this 17th day of November, 1969.

/s/ MARIANE LOETHER
Mariane Loether

Subscribed and sworn to before me
this 17th day of November, 1969.

ROBERT D. SCOTT
Notary Public, State of Wisconsin.
My Commission is permanent.

Temporary Restraining Order, filed November 17, 1969

Plaintiff having filed a complaint praying for a temporary restraining order, for a preliminary injunction, and plaintiff having filed an affidavit in support thereof, and the Court having considered the complaint and supporting affidavit, and the plaintiff having appeared by Seymour Pikofsky and the defendant having appeared by Atty. Robert D. Scott, and it appearing that the defendants will continue to violate Sections 3601-3631, Title 42, United States Code unless restrained by order of this Court, and unless restrained herein pending a hearing on plaintiff's motion for a preliminary injunction, will continue to cause immediate and irreparable injury and damage to the plaintiff:

IT IS ORDERED that the plaintiff's prayer for a temporary restraining order be and hereby is granted.

IT IS FURTHER ORDERED that the defendants be restrained and enjoined from directly or indirectly renting or otherwise disposing of a vacant upper half of a duplex house located at 2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin within the jurisdiction of this Court, the legal description of said property being as follows:

Barber and Platto's Subdivision in the South West One Quarter (¼), 16-7-22 Lot Four (4) North One Half (½), Lot Five (5).

Unless otherwise ordered by this Court, this order shall expire on Thurs., Nov. 20, 1969, at which time the motion for a preliminary injunction will be held at 10 A.M.

Issued this 17th day of Nov., 1969, at Milwaukee, Wisconsin.

/s/ JOHN W. REYNOLDS
United States District Judge

Answer, filed December 2, 1969

Now come the defendants, LeRoy Loether, Mariane Loether and Mrs. Anthony Perez by their attorneys, Frisch, Dudek, Slattery and Denney and for an answer to the complaint herein, admit, deny, qualify and allege as follows:

1. Answering paragraph One (1), admit the allegations contained therein, but allege with respect to Title 42, Sections 3601-3631, United States Code, that these statutes, particularly Section 3610 (d), provide that no civil action may be brought in any United States District Court if the person aggrieved has a judicial remedy, under a state or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in sub-chapter I, Chapter 45, Title 42, United States Code.

2. Answering paragraph two (2) deny knowledge or information sufficient to form a belief as to the citizenship and residence of the Plaintiff and therefore deny the same and put the Plaintiff to her proof thereof.

3. Answering paragraphs three through six inclusive (3-6), nine and ten (9-10), and twenty-four and twenty-five (24-25), admit the allegations contained therein.

4. Answering paragraphs seven and eight (7-8), deny knowledge or information sufficient to form a belief that Julie Rogers had been confined to a hospital for several weeks, or for any other period of time, and that Jacqueline Haessly is a friend of the Plaintiff, and that Mrs. Rogers requested Jacqueline Haessly, or any other person,

to look for an apartment for her, and therefore deny the same and put the Plaintiff to her proof thereof.

5. Answering paragraph eleven (11), admit that Miss Haessly told Mrs. Perez, among other representations, that she was looking for an apartment for a hospitalized friend.

6. Answering paragraphs twelve through fifteen inclusive (12-15), deny the sequence of events as set forth therein and allege with respect thereto that Miss Haessly represented to Mrs. Perez and Mrs. Loether that Mrs. Rogers would be interested in renting the apartment and offered to make a deposit thereon.

Further answering paragraphs twelve through fifteen inclusive (12-15), allege that in her conversation with Miss Haessly, the Defendant Mrs. Loether, advised her that the rental of the apartment was contingent upon a favorable personal interview with the prospective tenant and that no deposit was necessary until the interview would take place.

Further answering paragraphs twelve through fifteen inclusive (12-15), deny that Miss Haessly gave all the information requested by Mrs. Perez and Mrs. Loether and allege with respect thereto, that Miss Haessly was unresponsive and evasive as to the questions posed to her regarding the qualifications of the prospective tenant.

7. Answering paragraph sixteen (16), deny that Mrs. Loether told Miss Haessly that she would accept a deposit in the amount of $50.00 or any other amount.

8. Answering paragraph seventeen (17), deny that any deposit was accepted.

Answer, filed December 2, 1969

9. Answering paragraph eighteen (18), deny the allegations contained therein and allege with respect thereto that in Mrs. Loether's conversation with Mrs. Rogers, the latter raised the question as to why Miss Haessly had veiled the fact that she was of the Negro race and requested Mrs. Loether to find out why this was done.

Further answering paragraph eighteen (18), allege that upon Mrs. Loether's telephone call to Miss Haessly at the behest of Mrs. Rogers, Miss Haessly did not respond to Mrs. Rogers' question but asserted that the apartment had to be rented to Mrs. Rogers and threatened Mrs. Loether with coercion by legal process.

10. Answering paragraph nineteen (19), deny the allegations contained therein.

11. Answering paragraphs twenty through twenty-two inclusive (20-22), deny the sequence of the conversations as alleged therein and allege with respect thereto that Miss Haessly misrepresented Mrs. Loether's conversation to Mrs. Perez.

Further answering paragraphs twenty through twenty-two (20-22) allege that Mrs. Loether informed Miss Haessly that the impediment to rental of the apartment had developed as a direct result of Miss Haessly's threat and the demeanor and manner in which she conducted herself in attempting to arrange for the rental of the apartment.

12. Answering paragraph twenty-three (23), admit that Mrs. Loether subsequently informed Mrs. Rogers that the apartment would not be rented and allege with respect thereto that Mrs. Rogers was informed that the impedi-

ment to the rental of the apartment was the threat made by Miss Haessly and the demeanor and manner in which she conducted herself in attempting to arrange for the rental of the apartment.

13. Answering paragraphs twenty-six and twenty-seven (26-27), deny the allegations contained therein.

14. Answering paragraph twenty-eight (28) deny that the Defendants are violating or have violated Section 3604, Title 42, of the United States Code as alleged, or in any other manner.

Further answering paragraph twenty-eight (28) deny knowledge or information sufficient to form a belief that the Plaintiff is informed and believes that the Defendants will continue to violate the said section of the United States Code as alleged and therefore deny the same and put the plaintiff to her proof thereof.

AFFIRMATIVE DEFENSES

* * * * *

As and for a first affirmative defense these Defendants allege that they have made available for rent the dwelling in question to every prospective tenant and have negotiated therefore without regard to the race, color, religion, or national origin of any person, and these Defendants remain ready and willing to rent the dwelling in question to any person of the Negro race, excepting the Plaintiff herein.

As and for a second affirmative defense these Defendants allege that the Plaintiff was not a bona fide applicant for the dwelling in question.

Answer, filed December 2, 1969

As and for a third affirmative defense these Defendants allege that the denial of rental to the Plaintiff herein was directly and solely caused by the conduct, demeanor, lack of candor and threatened coercion of Jacqueline Haessly.

WHEREFORE, the Defendants demand judgment dismissing the complaint of the Plaintiff on its merits and for their costs and disbursements in this action.

/s/ EDWARD A. DUDEK
Edward A. Dudek
For: Frisch, Dudek,
Slattery and Denny
Attorneys for Defendants

DEMAND FOR A JURY TRIAL

The Defendants and each of them hereby demand trial by jury of the issues of fact in this action.

/s/ EDWARD A. DUDEK
Edward A. Dudek
For: Frisch, Dudek,
Slattery and Denny
Attorneys for Defendants

Certificate Of Service Shows Service on 2d day December, 1969.

/s/ ROBERT D. SCOTT

Order Granting Preliminary Injunction, filed December 19, 1969

This cause having come on to be heard on plaintiff's motion for a preliminary injunction on November 20, 1969, and due notice having been given to the defendants; and defendants, Mariane Loether and Mrs. Anthony Perez, having appeared in person and by Attorney Robert Scott, and defendant LeRoy Loether having appeared by Attorney Robert Scott; and the Court having considered the stipulation of facts entered into by all of the parties, the Court having considered the testimony given by the parties and witnesses, the Court having considered the arguments of counsel, and the Court having granted a preliminary injunction on the record and being fully advised in the premises;

IT IS ORDERED:

1. That the temporary restraining order hereinbefore entered be and it is hereby vecated.

2. That the defendants be and they are hereby temporarily enjoined from directly or indirectly renting or otherwise making unavailable the upper half of a duplex located at 2529 North Fratney Street, Milwaukee, Wisconsin, legally described as:

> Barber's and Platto's Subdivision in the South West One Quarter (¼), 16-7-22, Lot Four (4), North One Half (½), Lot Five (5);

unless and until the applicable provisions of the Fair Housing Act of 1968 have been complied with. This preliminary injunction will remain in effect pending final determination of this case on the merits.

Order Granting Preliminary Injunction, filed December 19, 1969

3. That no bond shall be required of the plaintiff.

4. That the matter is hereby set down for a pre-trial conference on January 5, 1970, at 4:00 P.M. in Room No. 471, Federal Building, Milwaukee, Wisconsin.

Dated at Milwaukee, Wisconsin, this 19th day of December, 1969.

JOHN W. REYNOLDS
U. S. District Judge

Pre-trial Order, filed February 10, 1970

The above captioned matter having come on for pre-trial on the 5th day of January, 1970, before the Honorable John Reynolds, and the plaintiff appearing by her attorney, Milwaukee Legal Services by Seymour Pikofsky, and the defendants appearing by their attorneys, Frisch, Dudek, Slattery, and Denny, by Edward A. Dudek and Robert D. Scott,

NOW THEREFORE IT IS ORDERED,

1. That the above captioned matter is to be tried to the Court.

2. That said trial is set for March 23, 1970, at 9:30 o'clock A.M., before the Honorable John Reynolds, Judge, without further notice to any of the parties.

3. That the evidence taken at the hearing on Plaintiff's motion for a Preliminary Injunction is to be incorporated at the trial.

4. That the issues to be tried are the issue of discrimination and the issue of actual damages suffered by the plaintiff.

5. That if the defendants wish to take depositions of the plaintiff and of her witness, Jacqueline Haessly, said depositions are to be taken by February 15, 1970.

6. That the witnesses are to be sequestered during discovery proceedings.

7. That the defendants are to notify the Court by February 15, 1970, if they wish a jury trial with supporting

briefs and that the plaintiff shall have ten (10) days in which to respond to said briefs.

8. That a report is to be made to the Court by February 19, 1970, as to the settlement offer made at the pre-trial conference.

Dated at Milwaukee, Wisconsin, this 10th day of February, 1970.

BY THE COURT:

/s/ JOHN W. REYNOLDS
John Reynolds, Judge

Pre-trial Order, filed May 7, 1970

ORDER FOLLOWING CONFERENCE HELD APRIL 30, 1970

At a conference held on April 30, 1970, following a court hearing on defendants' motion for a jury trial, Seymour Pikofsky and Otto Tucker appearing for the plaintiff and Robert Scott appearing for the defendants, the following stipulations and orders were made:

1. All discovery is to be completed by May 16, 1970, or be forever waived. The parties are to answer the questions propounded so far.

2. Plaintiff is to draft her comprehensive statement in narrative form as asked for in the attached standing final pretrial order and submit it to defense counsel not later than May 29, 1970.

3. Not later than May 29, 1970, counsel for all parties are to file with the court a statement in narrative form as to the contested and uncontested facts.

4. Not later than May 29, 1970, counsel for all parties are to file with the court a statement of the issues that they believe need to be tried.

5. Not later than May 29, 1970, counsel for all parties are to file with the court all of the other items set forth in the attached copy of the standing final pretrial order.

6. A status conference is hereby scheduled for June 22, 1970, at 4:00 P.M., in Room No. 471, Federal Building, Milwaukee, Wisconsin.

Pre-trial Order, filed May 7, 1970

Dated at Milwaukee, Wisconsin, this 7th day of May, 1970.

JOHN W. REYNOLDS
U. S. District Judge

STANDING FINAL PRETRIAL ORDER

(Civil Case)

For a good cause shown, IT IS ORDERED that in preparation for trial, counsel shall meet with each other not later than 20 days before the recited date for the final pretrial conference, and together prepare a report as directed below; that counsel for the plaintiff has the principal burden of composing the report which is to be submitted to the court and opposing counsel at least one week before the final pretrial conference; and that this report shall contain the following:

a. A comprehensive statement of all uncontested facts. If the case will be tried before a jury, it is contemplated that such statement will be read to the jury, and no proof will be received on the matters covered.

b. An agreed statement of contested facts. If counsel are unable to agree on all points, separate additional statements may be submitted.

c. Lists containing the names and addresses of each side's prospective witnesses. It is contemplated that other witnesses will not be permitted to be called except upon a showing of surprise.

d. Lists of the names and addresses of each side's prospective expert witnesses, together with a stipulated narrative statement of each such expert's background and

qualifications. If the case will be tried before a jury, it is contemplated that such statement will be read to the jury, and no proof will be received on the matters covered.

e. A schedule of all exhibits to be offered at the trial indicating those to which objection will be made with a brief statement as to the grounds for such objection.

f. An itemized statement of special damages.

g. A list of depositions, or portions thereof, to be offered at the trial with a brief statement indicating those portions to which objection will be made with a brief statement as to the grounds for objection.

h. A list of proposed questions which counsel desire to be submitted by the court to the jury on voir dire.

JOHN W. REYNOLDS
U. S. District Judge

District Court's Opinion and Order Denying Demand for Jury Trial

May 19, 1970

REYNOLDS, District Judge.

This is an action brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, which prohibits discrimination in the rental of housing. Plaintiff claims that defendants discriminated against her by refusing to rent her an apartment because she is a Negro. Plaintiff requested injunctive relief restraining the rental of the subject apartment except to the plaintiff, money damages for loss incurred by the plaintiff due to the alleged discrimination, punitive damages in the amount of $1,000, and attorney's fees.

The court granted plaintiff's motion for a temporary restraining order on November 17, 1969, and, following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the case. At a hearing on April 30, 1970, the Court, with consent of plaintiff, dissolved the preliminary injunction. Therefore, the only issues remaining in the suit are plaintiff's claim for compensatory and punitive damages and attorney's fees.

The defendants have requested a jury trial on these issues, and plaintiff has objected to this request. The parties have submitted briefs and argued to the court on this issue which is now before the court for decision.

[1, 2] To warrant a jury trial, a claim must be of such a nature as would entitle a party to a jury at the time of the adoption of the Seventh Amendment. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed.

893 (1936); United States v. Louisiana, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950). The question before this court, therefore, is whether the cause of action under 42 U.S.C. §§ 3601-3619 is one recognized at common law which consequently requires a jury trial. I find that this cause of action is a statutory one invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had. The action is not one in the nature of a suit at common law, and therefore there is no right to trial by jury on the issue of money damages in the case.

Defendant argues that the Seventh Amendment of the Constitution; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Harkless v. Sweeny Independent School District, 278 F.Supp. 632 (S. D. Texas 1968); and Ross v. Bernhard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), require a jury trial on the issue of plaintiff's prayer for money damages due to the alleged discrimination.

Beacon, Dairy Queen, and *Thermo-Stitch* hold that where equitable and legal claims are joined in the same cause of action, there is a right to trial by jury on the legal claims that must not be infringed by trying the legal issues as incidental to the equitable issues or by a court trial of common issues between the two. The Court in Swofford v. B & W, Inc., 336 F.2d 406, 414 (5th Cir. 1964), commented on these cases:

District Court's Opinion and Order Denying Demand for Jury Trial

"• • • This is not to say, however, that they have converted typical non-jury claims, or remedies, into jury ones. Therefore, we reject a view that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by jury."

The *Harkless* court granted a jury trial on the issue of back pay award in an action brought under 42 U.S.C. § 1983 seeking reinstatement as teachers following a discharge allegedly based on racial discrimination. However, § 1983 expressly provides that persons acting under color of state law who deprive other persons of constitutional rights shall be liable "in an action at law." There is no such provision in 42 U.S.C. § 3612(c).

The Supreme Court in *Ross* held that plaintiffs in a shareholder's derivative action had a right to a jury trial on those issues to which the corporation, had it brought the action itself, would have had the right to a jury trial. The Court found that where the claims asserted were damages against the corporation's broker under the brokerage contract and rights against the corporate directors because of their negligence, both actions at common law, "• • • it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors. • • •" 396 U.S. at 540, 90 S.Ct. at 739. While Ross may reflect "an unarticulated but apparently overpowering bias in favor of jury trials in civil actions," *Ross, supra,* at 551, 90 S.Ct. at 745, Justice Stewart dissenting, the case does

not stand for the proposition that any money claim in a cause of action must be tried by a jury. The decision deals narrowly with the right to jury trial in a shareholder's derivative action and is clearly distinguishable from the case before this court.

The section of the statute dealing with remedies for violation of the act, 42 U.S.C. § 3612(c), provides:

> "(c) *The court* (emphasis added) may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff *in the opinion of the court* (emphasis added) is not financially able to assume said attorney's fees."

On its face, this statutory language seems to treat the actual damages issue as one for the trial judge rather than a jury. District courts in Hayes v. Seaboard Coast Line Railroad Co., 46 F.R.D. 49 (S.D.Ga.1969), and Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F.Supp. 754 (M.D.Ala. 1969), have construed similar language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g),* to mean that the issue of back pay

* "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, *the court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may

award in employment discrimination cases does not require jury determination.

Both *Hayes* and *Cheatwood* held that the money damages issue of back pay in an action under 42 U.S.C. § 2000e-5(g) of the 1964 Civil Rights Act was not a separate legal issue, but rather was a remedy the court could employ for violation of the statute in a statutory proceeding unknown at common law, and that there was no right to a trial by jury on that issue. As I have noted, the language of the remedial provisions of 42 U.S.C. § 2000e-5(g) of the Civil Rights Act of 1964 and 42 U.S.C. § 3612(c) of the Civil Rights Act of 1968 are very similar. The purpose of the two acts is similar. Title VII of the 1964 Act prohibits discrimination on the basis of race, color, religion, sex, or national origin by specified groups of employers, labor unions, and employment agencies. Title VIII of the 1968 Act prohibits discrimination on the basis of race, color, religion, or national origin in the sale or rental of housing by private owners, real estate brokers, and financial institutions. The award of money damages in a Title VIII action has the same place in the statutory scheme as does the award of back pay in a Title VII action. Determining the amount of a back pay award in a Title VII action can be as difficult a question of fact as determining the amount of money damages in a Title VIII action. *Hayes*, 46 F.R.D. at 53.

An action under Title VIII is not an action at common law. The statute does not expressly provide for trial by

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include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). * * *" (Emphasis added.)

jury of any issues in the action. In the absence of a clear mandate from Congress requiring a jury trial, I find that the similarities between the remedial provisions of the Civil Rights Act of 1964 and 1968, in light of the undivided authority holding that the issue of money damages for back pay under Title VII of the 1964 Act is not an issue for the jury, compel the conclusion that the issue of compensatory and punitive money damages in an action under Title VIII of the 1968 Act is likewise an issue for the court. Accordingly, defendants' request for a jury trial must be denied.

Therefore, it is ordered that defendants' request for a jury trial be and it hereby is denied.

Plaintiff's Statement of Uncontested Facts, filed June 1, 1970

On Thursday, October 30, 1969, an advertisement appeared in the Milwaukee Journal offering for rent an apartment located at 2579 North Fratney Street, Milwaukee, Wisconsin.

The plaintiff Julia Rodgers is Black American. Miss Jacqueline Haesseley is Caucasian.

At the time that the advertisement appeared in the Milwaukee Journal Mrs. Rodgers was hospitalized in St. Mary's hospital in Milwaukee, Wisconsin. The advertisement was seen by Miss Haesseley who called the number given in the ad and spoke to the defendant, Mrs. Anthony Perez. She asked her if it would be possible to see the place. Mrs. Perez told her that she should see the place if she could get there before 5:00 p.m.

Miss Haesseley then went to see the apartment, arriving there about 4:30 p.m. on October 30, 1969. Mrs. Anthony Perez, who is a cousin of the owners of the property, Mrs. and Mr. Leroy Loether, took Miss Haesseley up to see the upstairs apartment.

Miss Haesseley told Mrs. Perez that she was looking at the apartment for a friend of hers who was in the hospital. Mrs. Perez stated that Mr. and Mrs. Loether were coming over that evening and they would have to make the decision as to whether or not Miss Haesseley could have the apartment for Mrs. Rodgers. Miss Haesseley stated that she was very interested in obtaining the apartment for Mrs. Rodgers and asked Mrs. Perez if she, Miss Haesseley should offer a deposit, would the deposit be accepted. Mrs. Perez told Miss Haesseley that she would call Mrs. Loether and let Miss Haesseley speak to her and she could ask her if they would accept a deposit. Mrs. Perez called Mrs.

Plaintiff's Statement of Uncontested Facts, filed June 15, 1970

Loether and Miss Haesseley spoke to her. Mrs. Loether asked various questions about Mrs. Rodgers, including where and why she was hospitalized, the number of children in the family, her marital status, and her financial status.

Mrs. Loether asked to speak to Mrs. Perez again and Mrs. Perez asked Mrs. Loether whether or not she would accept a deposit from Miss Haesseley in behalf of Mrs. Rodgers. Miss Haesseley then gave her $50.00 check to Mrs. Perez who gave her a written receipt. (Both check and receipt have previously been introduced into evidence and are part of the Court record.)

Mrs. Loether requested of Miss Haesseley and was given the hospital and room number and telephone number where Mrs. Rodgers could be reached and indicated that she would call her.

Mrs. Loether then called St. Mary's Hospital and discussed with her the rental of the apartment, and asking Mrs. Rodgers when she would be out of the hospital and when she could move into the apartment and whether or not she had someone to move her in. During the course of the discussion Mrs. Rodgers mentioned to Mrs. Loether that she was Black American.

Mrs. Loether then called Mrs. Perez back and spoke to Miss Haesseley who was still there. She told her that Mrs. Rodgers sounded like a very nice person. Mrs. Loether indicated that she had no objection to renting to a colored person. They (the Perez) stated that they had no objection to Mrs. Rodgers living upstairs but that they could not make the final decision and that it would have to be up to the Loethers since they were the owners.

Miss Haesseley attempted to call Mrs. Loether the next morning but was unable to reach her. She then called

Plaintiff's Statement of Uncontested Facts, filed June 15, 1970

Mrs. Perez who told her that Mrs. Loether was going out to the hospital that morning to see Mrs. Rodgers. That morning Mrs. Loether and Mrs. Perez visited Mrs. Rodgers at St. Mary's Hospital. They discussed the apartment rental but no decision was given to Mrs. Rodgers. She was informed that the Loethers were going out of town that evening and would be back on Tuesday morning when they would let Mrs. Rodgers know whether or not she could have the apartment. Mrs. Rodgers was informed several days later that the Loethers had decided to keep it vacant for a while and that the deposit Miss Haesseley had given to Mrs. Perez for Mrs. Rodgers would be returned.

During the year of 1968 and during the year of 1969 prior to October 30, 1969, Mrs. Julia Rodgers resided at 3160 North 1st Street in the City and County of Milwaukee. Her landlord during that period was one Adolphus C. Fifer. During her residence at the above address Mrs. Rodgers was responsible for maintaining her fuel supply with the Quickflash Co.

During the third telephone conversation between Miss Haesseley and Mrs. Loether on October 30, 1969 Miss Haesseley told Mrs. Loether that Mrs. Loether "had to rent" the apartment to Mrs. Rodgers.

Plaintiff's Statement of Contested Facts, filed June 15, 1970

At that time and some time prior to October 30, 1969, the plaintiff Julia Rodgers, had been looking for a new place to live. On several occasions Mrs. Rodgers had asked a friend of hers, Miss Jacqueline Haesseley, to look for a place for her also. Prior to this occasion Miss Haesseley had looked at other places for Mrs. Rodgers.

She (Miss Haesseley) answered various questions about her friend, Mrs. Rodgers, including marital status, income, and other questions that were asked by Mrs. Perez. She answered each and every question that Mrs. Perez asked her.

Miss Haesseley answered all questions asked about Mrs. Rodgers.

Miss Haesseley was informed that Mrs. Loether would accept a deposit of $50.00. Miss Haesseley asked if a check would be acceptable and was told a check would be all right.

Mrs. Loether told Mrs. Rodgers in a telephone call that she could have the apartment. Mrs. Loether then indicated to Mrs. Rodgers that she hadn't known that she was Black and that she was not sure that she could have the apartment.

Mrs. Loether said that she would have to discuss the matter with Mr. and Mrs. Perez because they were the ones who would have to live under Mrs. Rodgers. The phone conversation was then terminated and Miss Haesseley proceeded to discuss the matter of Mrs. Rodgers' race with the Perez.

Miss Haesseley then called Mrs. Loether back and told her that she had discussed the matter with Mr. and Mrs. Perez and that they had no objection and asked her if Mrs. Rodgers still had the place. Mrs. Loether informed Miss

Plaintiff's Statement of Contested Facts, filed June 15, 1970

Haesseley that they would still have to discuss the matter with the Perez and that they would do so that night when they would be coming over. Miss Haesseley informed Mrs. Loether that it was illegal to make race a consideration in the renting of an apartment or other property. Mrs. Loether was to let Miss Haesseley know by 8:00 p.m. whether or not Mrs. Rodgers was going to get the apartment. They did not call that night.

Mrs. Rodgers had previously asked Miss Haesseley to look for places for her which she had done, and also had authorized Miss Haesseley to put down a deposit if she found some place good.

As a result of Mrs. Rodgers being denied the rental of the apartment she suffered an increase in her blood pressure and severe emotional distress and harm which required her remaining in the hospital.

Further, as a result of Mrs. Rodgers being denied the apartment she was forced to make two additional moves necessitating the expenditure by Mrs. Rodgers of an additional $200.00.

Mrs. Rodgers frequently allowed the fuel supply to be depleted. Prior to October 30, 1969, Mrs. Rodgers had made no complaints concerning her heating in her apartment to her landlord, Mr. Adolphus Fifer. On December 15, 1967, the Quickflash Company made a delivery of 5 gallons of fuel oil after being advised that Mrs. Rodgers' oil had been depleted and at that time refused to extend any further credit to Mrs. Rodgers.

During the period of her residence at 3160 North 1st Street, Mrs. Rodgers came to be regarded as a poor tenant by her landlord because of her failure to supervise her children. She was gone from her home a good deal and

allowed her children to play without control. On one occasion the children broke down a door in the apartment building which led to another apartment. On another occasion, Mr. Fifer had to caution Mrs. Rodgers because her children were playing with matches in the building.

Thus statement by Miss Haesseley was made in a strident tone of voice and was in the nature of a command to Mrs. Loether. The statement was made without Mrs. Loether's having given any indication that she would not rent the apartment to Mrs. Rodgers or that she considered Mrs. Rodgers' color to be a factor in deciding whether to rent to her. Mrs. Loether asked Miss Haesseley what she meant by saying that the Loethers "had to rent" the apartment and at this moment, Mr. Loether came into the room where his wife was talking on the phone and overheard her asking the question. Mr. Loether then told his wife to tell whoever she was talking with that he did not "have to rent" the apartment to anyone. Mr. Loether gave this direction to his wife without knowing who the party was on the phone or who the prospective tenant was. Mr. Loether responded only to the demand made by an unidentified person to his wife and without any knowledge of the race of any prospective tenant or that race had even been made an issue by any person.

Pre-trial Order, filed July 6, 1970

The above entitled matter having come on for Pre-Trial Conference on the 22nd day of June, 1970 before the Honorable John Reynolds,

And the plaintiff appearing by her attorney Milwaukee Legal Services by Otto L. Tucker and Seymour Pikofsky and the defendants appearing by their attorneys Frisch, Dudek, Slattery, and Denny by Robert Scott:

NOW THEREFORE IT IS ORDERED THAT:

1. The plaintiff shall submit a brief on the issue of actual damages and shall also set forth the actual damages claimed and the evidentiary facts in support of such damages by July 31, 1970.

2. That the defendant shall have until September 1, 1970 to submit a reply brief.

3. That this matter is to be set for trial.

BY THE COURT

/s/ JOHN W. REYNOLDS
John W. Reynolds, *District Judge*

Dated at Milwaukee, Wisconsin this 6th day of July, 1970.

filed 7/6/70

Notice of Trial, filed August 19, 1970

TAKE NOTICE that the above-entitled case has been set for COURT TRIAL ON DAMAGE ISSUE at 10:00 A.M., on Monday, October 26, 1970, at Courtroom No. 425, Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin, before Judge John W. Reynolds.

Date August 19, 1970

RUTH LA FAVE
Clerk

By Roch Carter
Deputy Clerk

To OTTO L. TUCKER and
SEYMOUR PIKOFSKY
Milwaukee Legal Services
2218 North Third Street
Milwaukee, Wisconsin 53212
Attorneys for Plaintiff

ROBERT D. SCOTT
780 North Water Street
Milwaukee, Wisconsin 53202
Attorney for Defendants

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Transcript of Proceedings, October 26 and 27, 1970

Transcript of proceedings had in the above-entitled matter, before the Honorable John W. Reynolds, Judge of said court, commencing on the 26th day of October, 1970, at 10:50 o'clock in the morning.

APPEARANCES:

SEYMOUR PIKOFSKY, ESQ.
and
OTTO TUCKER, ESQ., Milwaukee Legal Services,
2200 North Third Street, Room 513
Milwaukee, Wisconsin,
appeared on behalf of the Plaintiff;

EDWARD A. DUDEK, ESQ.
and
ROBERT D. SCOTT, ESQ.,
780 North Water Street,
Milwaukee, Wisconsin,
appeared on behalf of the Defendants;

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[2] (The following proceedings were had in chambers at 10:50 a.m.:

The Court: I believe you requested a conference.

Mr. Pikofsky: Yes. What we wanted to do, Your Honor, is this: Find out what ground rules we are operating under. Your pre-trial order indicated the only issue to be tried was the issue of damages. The correspondence and other material from Mr. Dudek's office indicated that they are thinking in terms of a trial on the issue of discrimination. This was not our understanding, and I thought

before we proceeded, that we ought to have some guidance from the Court as to whether we are following the pre-trial order and the only issue to be tried is the damages or whether we are going into the whole ball of wax.

Mr. Dudek: We didn't interpret your pre-trial order to be that the Court made a finding in advance of trial that the people are guilty of discrimination.

The Court: Under the rules, we held a hearing for preliminary injunction and I made a tentative finding and I feel some additional evidence to offer, I think you have a right to present it, but I don't see any point in having cumulative evidence.

Mr. Dudek: I agree with the Court on that, but we did not put in our entire case at the time of [3] the hearing. We did not have our pleadings in, if I recall, at that time. And we take issue strongly with the case that is attempting to be made out on the issue of discrimination and we so advised the Court each time we were together here.

The Court: Well, I believe that you have a right to present additional evidence, but I don't see any reason to repeat what is already in the record. I reviewed this morning the statement of contested and uncontested facts, and other than your bald assertion, there is no discrimination, I don't know what other facts you are alleging. I am willing to listen. If you have any, I will hear them.

Mr. Dudek: First of all, with reference to the Cross-Examination of the witnesses are concerned, this was not complete at the time that we were on the preliminary hearing.

The Court: What other facts do you plan to prove other than your assertion there was no discrimination? What evidentiary facts?

Transcript of Proceedings, October 26 and 27, 1970

Mr. Dudek: Evidentiary, with reference to the type of people that are involved here. The fact that they have lived since childhood within what is the center of the colored district. The fact that since they were married, they spent seven years in the same [4] area. That they have friends that they have socialized with people that are colored, that colored people they have entertained at their home in family gatherings. That they are also entertained by colored people in their particular homes. Prejudice discriminations is a state of mind. We are talking about people either consciously or unconsciously acting in a biased, prejudiced and intolerant manner, and I don't think you can turn this thing off—off and on with reference to a particular case. But what we have got here are some assumptions that have been made by two plaintiffs on a skinny set of facts and charging these people before there is even a turndown over here, it appears to me, and the position that we take that because of the mere fact that there is a turndown here and she happens to be colored, based by Miss Haesseley that there is an act of discrimination here and we take strong exception to that.

There is nothing even in the record as a prima facie case with reference to Miss Perez. I don't know what she's doing in this particular case and there has not been any trial as to that lady. Mr. Loether hasn't had his say with reference to the allegations as they are with reference to him. The burden here, Judge, is that of the Plaintiffs as to each of these Defendants. And all we tried at the time the preliminary [5] injunction was here with reference to the rental was the matter of whether or not they may prevail on a trial. This does not mean that after we come into a full case, a full Cross-Examination, after we learn more of the facts, this matter came on within

Transcript of Proceedings, October 26 and 27, 1970

I think two or three days after this action was started. And before we had a chance to get involved in it. As far as the trial on the damages are concerned, there's been a failure to comply with your pre-trial order that they submit proof as to actual damages. In fact, his letter which the Court has a copy of says that there are no actual damages.

The Court: Yes, I know. So it's really narrowed down to punitive damages.

Mr. Dudek: It's narrowed down to punitive damages and we submit to the Court on this issue of discrimination.

Mr. Tucker: If Your Honor please, I think you are narrowing it too much. I think my letter gives also the position—

The Court: I am not narrowing. You said there was no actual damage.

Mr. Tucker: No actual damage, but I think maybe I am confused in the terms there. What I really have in mind, we may not have actual damages that you can say pinpoint right to there, but you do have actual [6] damages and you would have compensatory damages. When I use that double language, actual damages, what I am trying to say is this, to say that there was actually money out of the pocket to go to Fratney Street and try to rent that house, no, but there are other damages because we did not get the Fratney Street property. We had to do a double move. We had to find—

The Court: That may well be so. But you haven't asserted it.

Mr. Tucker: No. But I expect to bring that forward in showing the compensatory damages there to the Plaintiff.

The Court: Aren't actual damages and compensatory damages the same thing?

Mr. Tucker: That's what I am saying.

The Court: There are punitive damages—

Mr. Tucker: Maybe I have the hang-up on defining the terms.

The Court: There seems to be and I don't—it seems to be really my impression is a complete misunderstanding as to what the import of our standing pre-trial order here is, the statement of contested and uncontested facts. No one seems to be able to understand that, and I am sorry, but I think in the interest of justice, as we say, we will go ahead with the trial [7] the best we can.

(Attorney Robert D. Scott enters room.)

The Court: I mean, I don't know what you are talking about. There is no actual damages, there's no compensatory damages. I think you are here on punitive. My understanding of the file. Now, you tell me you are here on something else. So I think the only way to proceed, let's go and have the trial and either side can object if they want to and you can make your offer of proof for the record, if I don't rule in your favor.

What else can I do?

Mr. Pikofsky: I understand there's no need to go through all the testimony again that was taken on the preliminary.

The Court: As I see it, I don't—no one has told me, with due respect to counsel, of any fact that really hasn't already been made a matter of record, that is not in this transcript.

Mr. Dudek: Judge, I am disturbed over the comment to the Court at the preliminary time by the response as a matter of prejudice that anybody can claim they are not prejudiced and the Court has never seen a person who claimed he's prejudiced.

The Court: If you want your man to say he's not prejudiced, I am willing to hear him say it.

[8] Mr. Dudek: No, I am not saying that. I think there is something more to that, if the Court please.

The Court: Let's go on with the trial. You can argue that to me. You have a perfect right to argue anything you want to. I just think that a judge has to judge things by the facts, of what people do, and their acts and conduct, because no one is going to come into court and say I am prejudiced.

Mr. Dudek: The only point we are trying to say—

The Court: That is my personal view. It's not a statement of law, it's my personal view. And I don't know what you want me to do now. What do you want me to do? What is your request?

Mr. Dudek: I want to try my case. I want them to prove up their case. I am not asking they come in and be duplicitous and to go over matters that are already in the record which the Court is trying. But I am saying this, we have —when this matter was heard, we took it that it was not a trial on the merits, that this thing had to do with reference to the temporary restraining order and nothing more.

Now, if we can go ahead and shorten the trial and the Court's time with reference—

The Court: All they have to do is move all [9] the evidence taken at the hearing on the preliminary injunction be incorporated and it's automatic under the Federal Rule 65.

Mr. Dudek: We have no objection to that, Judge.

The Court: All right.

Mr. Dudek: Except we are saying we haven't tried this matter on discrimination.

The Court: If you have anything new to come forth, I will hear it. I am at your service.

Transcript of Proceedings, October 26 and 27, 1970

(The following proceedings were had in open court, commencing at 11:03 a.m.:)

The Deputy Clerk: Case No. 69-C-524, Julia Rodgers versus Leroy Loether, Mariane Loether and Mrs. Anthony Perez, before the Court at this time for trial.

Can I have the appearances, please.

Mr. Pikofsky: Appearing for the Plaintiff, Milwaukee Legal Services by Otto L. Tucker and Seymour Pikofsky and the Plaintiff, Mrs. Julia Rogers in person.

Mr. Dudek: Edward A. Dudek and Robert Scott representing Mr. and Mrs. Loether, and Mrs. Perez who are present in court.

The Court: We have had a hearing on motion for preliminary injunction. Under Rule 65, I will so order, that that be complied with, any evidence received, and I am reading from the rule now, upon application for [10] preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated at the trial.

And so everything that was received at that time will become part of this trial.

The parties have also subsequent to the time of the hearing on a preliminary injunction, I met with the parties several times, I believe, in pre-trial conference trying to resolve the differences here. It is my understanding that the Plaintiff no longer wishes to rent the apartment. It is also my understanding that Defendant is perfectly willing at this time, anyway, or was at one of those conferences to rent it to a Negro. And that the parties have entered into a statement of uncontested facts which was filed on June 15th, 1970. I don't know if it's—I don't think there are any facts that are here that really were not in the original hearing, but I want to know will the lawyers

please get out in front of them that statement of uncontested facts. I want to know if there is any fact in there that they are incapable of stipulating to.

Mr. Pikofsky: Your Honor is referring to the statement of uncontested facts?

The Court: Yes. These matters are not contested.

[11] Mr. Pikofsky: If Your Honor please, we are prepared to stipulate to all the statements contained in the statement of uncontested facts.

The Court: All right. How about Mr. Dudek?

Mr. Dudek: The same.

The Court: All right. The statement of uncontested facts, all the facts listed there will be received on stipulation.

All right. Now, Mr. Pikofsky, do you have anything further?

Mr. Pikofsky: Yes, Your Honor. Regarding the element of damages, we will call the Plaintiff Julia Rogers.

The Court: All right.

JULIA ANN ROGERS, called as a witness herein on her own behalf, being first duly sworn, was examined and testified as follows:

The Deputy Clerk: State your full name, and spell your last name for the record, please.

The Witness: Julia Ann Rogers, R-o-g-e-r-s.

Direct Examination by Mr. Pikofsky:

Q. Mrs. Rogers, would you state for the record, please, your name and address? A. Julia Ann Rogers, 2515 West Glendale Avenue.

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Transcript of Proceedings, October 26 and 27, 1970

[17] • • •

Q. You moved from the First Street address then? A. Right. I believe so. I am not sure of the date, but it was before Christmas. And it was either the first or the beginning of the second week. I can't remember exactly.

Q. Where did you move to at that time? A. I moved to 136 East Burleigh.

Q. Now, in making that move, what, if any, expenditures did you have?

Mr. Dudek: Objected to as being irrelevant and not in compliance with the Court's pre-trial order. Included as not only an order with referecne to itemized—included in that pre-trial order is that we were to be furnished with an itemized statement of the damages that they claimed. We have not been furnished with any itemized statement.

Mr. Pikofsky: If Your Honor will bear with me for one moment, I believe in the deposition, in the adverse examination taken by Mr. Scott of the witness, taken on May 14, 1970, the witness in response to Mr. Scott's questions—

The Court: That is not the objection.

Mr. Pikofsky: —testified as to damages.

The Court: That is not the objection. I don't really know why it is so difficult—well, the standing [18] pre-trial order is designed to boil down all the discovery so we know what you men are really arguing about. Now, there is nothing in this file in compliance with the standing pre-trial order indicating what the actual damages were in this case. Now, there may be something tucked away somewhere in all the discovery, but there is nothing that has been

submitted. I think the objection should be sustained. I will allow you to continue under Rule 43, make an offer of proof, whatever you wish to make. I want you to have a complete record so you may continue as an offer of proof in question and answer form.

Mr. Pikofsky: If Your Honor please, at this time—

The Court: You may continue as an offer of proof, or are you going to argue with me about it.

Mr. Pikofsky: No, I am not going to argue about it with Your Honor.

The Court: Go ahead.

Mr. Pikofsky: I plan to make the offer of proof at this time.

The Court: All right. Go ahead.

Mr. Pikofsky: If Your Honor please, Plaintiff at this time is prepared to prove that—

The Court: You can make it through question [19] and answer.

Mr. Pikofsky: All right, fine, thank you, Your Honor.

Could you read back the last question, please.

(Question read.)

The Witness: Actual moving costs, is that what you are asking me?

Mr. Pikofsky: Yes.

The Witness: Schmidt Movers moved me from the First Street address to the 136 address and it was $100. $55.00 of that was reimbursed to me by the Welfare Department.

Mr. Pikofsky:

Q. Was the other $45.00 reimbursed? A. No.

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Transcript of Proceedings, October 26 and 27, 1970

[205] • • •

The Court: All right. Well, this has been a long and tortuous lawsuit. The action was brought under Title VIII of the Civil Rights Act of 1968, 42 U.S. Code Section 3601-19 which prohibits discrimination in the rental of housing. The Plaintiff has claimed that she was discriminated against by the Defendants in that they refused to rent her an apartment because she was a Negro. The Plaintiff has requested injunctive relief restraining the rental of the apartment except to her, money damages for loss that she has sustained due to the alleged discrimination and punitive damages in the amount of $1,000 and attorney's fees.

I granted the Plaintiff's motion for temporary restraining order on November 17th, 1969 following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the Court. At that time, [206] of the preliminary hearing, I found there was probable cause to believe there was discrimination in this case and that she could probably establish that on a final hearing.

The Court had many conferences with the parties trying to work this out. But to no avail. And at one of those, on the hearing of April 30th, 1970, the Court with the consent of the Plaintiff dissolved the preliminary injunction because by that time the Plaintiff was no longer interested in the apartment. Therefore, the only issue remaining for this hearing today, yesterday and today, was for the claim—the final hearing on the question of

discrimination and the claim for compensatory and punitive damages and attorney's fees.

It appears that on, from the evidence and the entire file and both hearings, October 30, 1969 an advertisement appeared in the Milwaukee Journal, a newspaper published in this city offering for rent this apartment which was located at 2529 North Fratney Street, Milwaukee, Wisconsin. And it appears that Plaintiff Julia Rogers is a black American and Miss Jacqueline Haessly is Caucasian, and the Defendants are at least white, I don't know if they are Caucasian, I never know what these things are, but they are white. At the time the ad appeared in the paper, Mrs. Rogers was hospitalized [207] at St. Mary's Hospital here in Milwaukee. The ad was seen by her friend, Miss Haessly, who called the number given and spoke to the Defendant Mrs. Perez. She asked Mrs. Perez if it would be possible to see the apartment and Mrs. Perez told her she could come over if she could get there by 5:00 p.m. of that day. Miss Haessly went to see the apartment, arriving there at 4:30 p.m. on October 30th, 1969. Mrs. Perez is a cousin of Mrs. Loether and Mrs. Perez took Miss Haessly to see the upstairs apartment. Miss Haessly told Mrs. Perez that she was looking for a place for a friend of hers who was in the hospital. Mrs. Perez stated that Mr. and Mrs. Loether were coming over that evening, that they would have to make the decision as to whether or not Miss Haessly could have the apartment for Mrs. Rogers. Miss Haessly stated that she was very interested in obtaining the apartment and asked Mrs. Perez if she, that is Mrs. Haessly, should offer a deposit, and would the deposit be accepted. Mrs. Perez told Miss Haessly that she would call Mrs. Loether and Mrs. Loether was in fact called and

Miss Haessly spoke to Mrs. Loether and to find out whether or not a deposit would be accepted.

It appears that in that conversation, Mrs. Loether asked various questions about Mrs. Rogers, such as where she was hospitalized, how many children in the [208] family, marital status and financial status, but in any event, did not ask about race, and Mrs. Loether then asked to speak to Mrs. Perez and Mrs. Perez as a result of these conversations was authorized by Mrs. Loether to accept a deposit and to give a receipt. At least she did accept a deposit and she did give a receipt.

And up until that time, there was no problem. I think up until that time, there is no question in my mind, that the apartment was rented, at least effectively rented. Then Mrs. Loether requested Mrs. Haessly and was given the hospital room number and she talked to Mrs. Rogers and then she called Mrs. Rogers at the hospital and discussed the rental of the apartment at which time Mrs. Rogers advised Mrs. Loether that she, Mrs. Rogers, was a black person. Then for the first time the question of race came up and Mrs. Loether became concerned about the race of the prospective tenant and, as I see it, the rental of the apartment was revoked at that stage and it was revoked because of race, at which time Miss Haessly came back into the picture and made it clear to Mrs. Loether that that was against the law, she could not do that. And the testimony indicates it was about this time that Mr. Loether came in and also learned that he was told that he had to rent this apartment to someone that he didn't want to rent it to, and that he believed that no one is going to tell him

what to do. Well, that is a difficult question. I think that the law does tell him what to do. And he may find that very difficult to accept. But it is the law nevertheless. The deal was closed, it was effectively closed. Mrs. Perez in effect became the agent of these people to rent the apartment. She rented the apartment and then the deal, after it was closed, when race was mentioned, it was revoked and then I think that the acts of Miss Haessly in telling them—I am not saying she didn't have a right to do this, but I think her act of telling the Loethers that they had to rent it probably hardened their position. In short, I think but for the race of Mrs. Rogers, she would have had the apartment, because that was the only question these people were talking about from that time on. They haven't discussed anything else really.

I don't believe it's necessary for me to go into all the details—well, I might as well. In any event, Mrs. Loether who then actually went to see Mrs. Rogers at the hospital, to see if they could work out something, but it turned out that that could not be worked out.

I am also mindful of the fact that Mr. Loether, being a little stubborn about this, and I do not look [210] upon the Loethers certainly as the worst and most bigotted people I have come in contact with in this world, and that is what makes this case more difficult than some. Now, we get to the questions—although I am satisfied that there is only one conclusion I can reach and that is the apartment was not rented because of the race of Mrs. Rogers and therefore it's a violation of the Federal law.

Transcript of Proceedings, October 26 and 27, 1970

Now, we come to the questions of damages. The Loethers have indicated or did indicate they were willing to rent this to a black person but they consistently maintained the position they were not willing to rent it to Mrs. Rogers, and therefore I think that that—here we are interested in Mrs. Rogers' rights, but I recognize the property was vacant for an extended period of time and the Loethers have been subjected to a lot of expenses. I do not believe there have been any compensatory damages proven in this case or out-of-pocket expenses of that nature, but I do think that an award of $250 in punitive damages will be in order. It probably takes the wisdom of a Solomon to decide these cases fairly, but that is the best I can do. And I think under all the circumstances, I am not going to award—I know Milwaukee Legal Services is very interested in establishing the position that they should [211] be entitled to attorney's fees in these matters and maybe they should in the proper case, but considering everything in this case, I am just not going to award any attorney's fees and costs.

Thank you, gentlemen.

Mr. Tucker: If Your Honor please,—

The Court: You may draft an order in accordance with this opinion.

Mr. Tucker: I was wondering about the costs. You are not awarding costs?

The Court: No.

Mr. Tucker: Very well, sir.

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Judgment of District Court

December 7, 1970

This action came on for trial before the Court, Honorable John W. Reynolds, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that the plaintiff, Julia Rogers, recover of the defendants, LeRoy Loether, Mariane Loether and Mrs. Anthony Perez $250.00 as punitive damages; further ordered, that compensatory-actual damages, costs and attorney's fees are hereby denied.

Opinion of Court of Appeals

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1145

JULIA ROGERS,
Plaintiff-Appellee,
v.
LEROY LOETHER and MARIANE LOETHER, his wife and MRS. ANTHONY PEREZ,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 69-C-524

JOHN W. REYNOLDS, *Judge.*

ARGUED FEBRUARY 22, 1972 — DECIDED SEPTEMBER 29, 1972

Before SWYGERT, *Chief Judge,* STEVENS, *Circuit Judge,* and CAMPBELL, *District Judge.**

STEVENS, *Circuit Judge.* The question presented is whether appellant was entitled to a jury trial in an action for compensatory and punitive damages brought under § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612.[1]

In her complaint, plaintiff alleged that the three defendants had refused to rent her an apartment because of

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

[1] Section 812 provides, in part:
"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action

her race.[2] She requested injunctive relief restraining defendants from renting the apartment to anyone else, money damages for her actual losses, punitive damages of $1,000, and attorney's fees.

The district court, after an extended hearing, entered a preliminary injunction. Subsequently, with plaintiff's consent, the injunction was dissolved; thereafter only plaintiff's claims for compensatory and punitive damages and attorney's fees remained. Defendants' request for a jury trial of those issues was denied. After trial, the court found that plaintiff had suffered no actual damages but assessed punitive damages of $250; the prayer for attorney's fees was denied.

On appeal defendants contend that the finding of discrimination is clearly erroneous, that it was error to award punitive damages, and that they were entitled to a jury trial. We shall not describe the evidence of discrimination except to note that it was marginal; whichever way the trial judge had ruled, his determination of that issue would not have been clearly erroneous.[3] We are also

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[1] (Continued)

shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: . . . .

"(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 82 Stat. 88, 42 U.S.C. § 3612.

[2] Section 804 of the 1968 act provides, in part:

"As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." 82 Stat. 83, 42 U.S.C. § 3604.

[3] Defendants contend that their refusal was motivated by the obnoxious behavior of a white social worker who was helping the plaintiff find an apartment; they had offered to rent the apartment to any black tenant other than the plaintiff and offered considerable evidence of absence of racial prejudice by either themselves or other tenants in the apartment. On the other hand, plaintiff's evidence tended to indicate that negotiations proceeded smoothly until defendants learned that plaintiff was a Negro.

satisfied that if his finding of discrimination is accepted, an award of punitive damages was authorized by the statute notwithstanding the absence of any actual loss to the plaintiff.[6] We shall confine our analysis to the jury trial issue.

The district court held that a jury trial was not required by the Seventh Amendment[7] or by a fair interpretation of the statute.[8]

The court rejected the constitutional claim on the grounds (1) that the cause of action was created by statute and not recognized at common law; and (2) that the statutory claim invoked the equitable powers of the court and the amendment has no application to the recovery of money damages as an incident to complete equitable relief. Both propositions are supported by *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49.[9]

The district court also considered the award of damages in a housing discrimination case arising under the 1968 Act analogous to an award of back pay in an employment discrimination case under the Civil Rights Act of 1964 and therefore relied on cases holding that there is no right to a jury trial in such litigation.[8] In its opinion the district court placed no reliance on the argument, sometimes advanced by proponents of civil rights legislation, that al-

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[6] As we read the statute it does not require a finding of actual damages as a condition to the award of punitive damages. In any event, in other litigation the federal courts have held that punitive damages may be awarded without requiring an award of compensatory damages. See, *e.g.*, *Wardman-Justice Motors, Inc.* v. *Petrie*, 39 F.2d 512, 516 (D.C. Cir. 1930); *Basista* v. *Weir*, 340 F.2d 74, 85-88 (3rd Cir. 1965). The *Basista* case involved a suit against policemen for punitive damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

[7] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." United States Constitution, Amendment VII.

[8] The opinion is reported at 312 F. Supp. 1003.

[9] The district court also cited *United States* v. *Louisiana*, which holds that the Seventh Amendment is "applicable only to actions at law." 339 U.S. 699, 706.

[8] *Hayes* v. *Seaboard Coast Line R.R.*, 48 F.R.D. 49 (S.D. Ga. 1970); *Cheatwood* v. *South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969).

lowance of a jury trial might undermine effective enforcement of the statute.[9]

Our study of the issue persuades us that (1) the constitutional right to trial by jury applies in at least some judicial proceedings to enforce rights created by statute; (2) this action for damages is "in the nature of a suit at common law";[10] (3) the nature of the claim is "legal" within the test identified in *Ross* v. *Bernhard*, 396 U.S. 531, 538; (4) the right to a jury trial may not be denied on the ground that the damage claim is incidental to a claim for equitable relief; (5) cases involving an award of back pay pursuant to the 1964 Act are inapplicable; and finally (6) in view of our grave doubts as to the constitutionality of a denial of the right to a jury trial and the failure of Congress expressly to indicate that the traditional procedure for litigating damage claims should not be followed, the statute should be construed to authorize trial by jury. Accordingly, we have decided to reverse.

I.

The Seventh Amendment preserves the substance of the right to a jury trial which existed under English common law when the amendment was adopted.[11] It has never been suggested that the application of the amendment is narrowly confined to such common law writs as might be enforceable in a federal court. On the contrary, since the bulk of the civil litigation in the federal judicial system involves the assertion of a federal right derived either from an act of Congress or the Constitution itself, necessarily the principal significance of the Seventh Amend-

[9] See, *e.g.*, mention of such factors in Note, Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws, 69 Colum. L. Rev. 1019, 1051; Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167; Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1264. Among the cases, see *Hayes* v. *Seaboard Coast Line R.R.*, 46 F.R.D. 49, 53 (S.D. Ga. 1970); *Lawton* v. *Nightingale*, ... F. Supp. ...., 41 U.S.L.W. 2041 (D.C. Ohio, June 27, 1972).

[10] See *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. at 48.

[11] *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657.

ment has been in such cases.[12] It is perfectly clear that the fact that a litigant is asserting a statutory right does not deprive him or his adversary of the protection of the amendment.

In *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, Mr. Justice Story, writing for the Court, rejected the contention expressed by Mr. Justice M'Lean in dissent that the amendment was inapplicable because the claim arose not under the common law but rather under the statutes of Louisiana.[13] Mr. Justice Story focused on the character of the claim as a "legal right" and eloquently described the purpose of the amendment:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'In suits at common law, where the value in controversy shall

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[12] "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob* v. *New York City*, 315 U.S. 752.

[13] "It is not strictly a common law proceeding; but a proceeding under the peculiar system of Louisiana; . . . .

* * *

"In the state of Louisiana, the principles of common law are not recognized; neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other states. This system may be called the civil law of Louisiana, and is peculiar to that state." 28 U.S. at 449-450 (Mr. Justice M'Lean dissenting).

exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any Court of the United States, than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law, they meant what the constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." 28 U.S. at 445-446.

In an unbroken line of cases involving enforcement of statutory rights, the Supreme Court has treated the right to a jury trial as a matter too obvious to be doubted. Thus, in a civil action to recover a statutory penalty for a violation of the immigration laws, the first Mr. Justice Harlan, speaking for the Court, said that the "defendant was, of course, entitled to have a jury summoned in this case." *Hepner* v. *United States*, 213 U.S. 103, 115. In an action for treble damages under § 7 of the Sherman Act,

Mr. Justice Holmes, also speaking for a unanimous Court, considered it plain that "the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29. In a case alleging violation of the Safety Appliance Act of 1910, which did not expressly authorize a private remedy, the Court found an implied right to recover damages in a jury trial "according to a doctrine of the common law." *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 39. In a case involving an ambiguous claim for damages, either as an amount due under a contract or as a statutory claim for damages for trademark infringement, the Court held that the claim was "wholly legal in its nature however the complaint is construed" and that the "constitutional right to trial by jury" was applicable to the claim. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477. And in an action brought under § 4 of the Clayton Act, the Court has expressly characterized the right to a jury trial as "constitutional." *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 510.[14]

N.L.R.B. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, does not hold—as is sometimes assumed—that no jury trial is required in a cause of action created by statute since any such action would have been unknown to the common law and therefore beyond the reach of the Seventh Amendment. The *Jones & Laughlin* opinion expressly recognizes that the amendment is applicable not only to a suit at common law, but also to a judicial proceeding "in the nature of such a suit." The distinction drawn in the opinion is not between substantive rights derived from the common law as opposed to those created by statute;

[14] "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trial by the court, that discretion is very narrowly limited and must, wherever possible, be exercise to preserve jury trial." *Id.* at 510.

It is of interest that in the elaborate argument presented to us in *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11 (7th Cir. 1972), *cert. denied*, ... U.S. ..., 40 U.S.L.W. 3617 (June 26, 1972), in which the decision turned on the constitutional right to a jury trial in an action asserting rights under § 10(b) of the Securities Act of 1934, none of the defendants even suggested that the statutory source of plaintiffs' claim affected their right to demand a jury.

it is the difference between a proceeding "in the nature of a suit at common law" and a "statutory proceeding."[15]

The Court's reference to a "statutory proceeding" rather than to a judicial proceeding brought to redress a right created by statute is important. Cases such as *Parsons* v. *Bedford* and *Fleitmann* v. *Welsbach Co.* were such judicial proceedings, and their teaching is not undermined in the slightest by the *Jones & Laughlin* holding. The procedure approved by *Jones & Laughlin* was, of course, fundamentally different from a common law trial. It was administrative rather than judicial and did not invoke the original jurisdiction of a court in determining factual issues or fashioning a remedy. The initial case was not "tried" in a court of law or equity; it was "tried" in a separate *proceeding* created by statute.[16]

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[15] The Court's entire discussion of the Seventh Amendment issue occupies less than one page of a 27-page opinion. That page includes the Court's discussion of both the historic view that no jury is required if the recovery of damages is an incident to equitable relief (a proposition discussed in part IV of this opinion) and to the statutory proceeding point. The Court said:

> "The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields* v. *Thomas*, 18 How. 253, 262; *In re Wood*, 210 U. S. 246, 258; *Dimick* v. *Schiedt*, 293 U. S. 474, 476; *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 657. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. *Clark* v. *Wooster*, 119 U. S. 322, 325; *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 279. It does not apply where the *proceeding* is not in the nature of a suit at common law. *Guthrie National Bank* v. *Guthrie*, 173 U. S. 528, 537.
>
> "The instant case is not a suit at common law or in the nature of such a suit. The *proceeding* is one unknown to the common law. It is a *statutory proceeding*. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." 301 U.S. at 48–49. (Emphasis added.)

[16] That this is what the Court meant when it referred to a "*proceeding* . . . not in the nature of a suit at common law" (emphasis added) is clear from the case which it cites to support the statement, *Guthrie National Bank* v. *Guthrie*, 173 U.S. 528. In that case a territorial legislature set up a special commission that did not include a jury to hear certain claims against a municipality. The claims had no legal force, but the legislature thought it equitable to provide for their payment in appropriate cases. While a court became involved in approving or disapproving the recommendations of the commission, it is clear that the *proceeding*, and not merely the right to relief, was statutory. See Developments, *supra* note 9, 84 Harv. L. Rev. at 1266–1268.

Here there is no statutory *proceeding*. The statute authorizes a "civil action" in the courts of the United States. The rights protected and the relief available are set forth in the statute, but the proceeding is not statutory in the *Jones & Laughlin* or *Guthrie*[17] sense.[18] The issue we must consider, therefore, is whether an action for damages authorized by the Civil Rights Act of 1968 is, in the language of *Jones & Laughlin*, "in the nature of a suit at common law."

II.

There are three reasons why this action is the kind of case which is appropriately described as in the nature of a suit at common law.

First, the tribunal whose jurisdiction is invoked is a court created pursuant to Article III of the Constitution. Unquestionably, congressional power to prescribe the procedures to be employed in such a court is limited by the Constitution and specifically by the Seventh Amendment.[19] The proceeding is judicial in character rather than administrative or "statutory." In all respects—at least all except the right to a jury trial if our appraisal of that right is not correct—it is clear that the procedure to be

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[17] See note 16, *supra*.

[18] In making a similar analysis of *Jones & Laughlin* in the context of a damage remedy for employment discrimination under Title VII of the Civil Rights Act of 1964, one commentator drew this conclusion: "The Court there held that a jury trial was not required in a 'statutory proceeding'; its concern was to protect the comprehensive administrative scheme of the NLRB, which would have been substantially destroyed if jury trials were required. The relevant distinction thus appears to be between those statutory actions which invoke an administrative process and those which do not. If the Congress makes a judgment that a comprehensive scheme of administrative adjudication is required, the Court will be willing to find that it is a 'statutory proceeding' to which the seventh amendment has no application. If, however, a statutory claim is entrusted to court decision, where there is no functional justification for not granting a jury trial, and the claim is for the type of relief normally awarded by a court of law, as would be the case in an action for compensatory damages under Title VII, the similarity to common law forms of action will require a jury trial." Developments, *supra*, note 9, 84 Harv. L. Rev. at 1267-1268.

[19] In *Minneapolis & St. Louis R.R.* v. *Bombolis* the Court expressly noted that "the Seventh Amendment is controlling upon Congress." 241 U.S. 211, 219.

followed in this case is precisely that which is applicable to suits at common law which are tried in the federal judicial system.

Second, the remedy sought, including both compensatory and punitive damages, is the relief most typical of an action at law. If, as the scholars have consistently indicated, we should look to history for guidance in determining whether or not a claim is of the kind which is triable to a jury,[20] unquestionably, the prayer for damages points to that result.[21]

Finally, the nature of the substantive right asserted, although not specifically recognized at common law, is analogous to common law rights. An English innkeeper who refused, without justification, to rent lodgings to a traveler was apparently liable in an action at law triable to a jury.[22] Refusing to rent an apartment on the false ground

[20] The proposition that we should look to history for guidance is well settled. See 5 Moore's Federal Practice ¶ 38.11 [7]; 9 Wright and Miller, Federal Practice and Procedure, Civil § 2302; James, Civil Procedure § 8.1 at p. 338 (1965). Even the dissenters in *Ross* v. *Bernhard* agreed, 396 U.S. 531, 543 n.1.

[21] Damages, of course, were traditionally awarded in legal actions to compensate a plaintiff for a breach of a legal duty owed him by defendant. That duty may be prescribed by the common law (*e.g.*, the tort law of negligence), by contract or by statute. The origin of the duty does not necessarily determine the nature of the suit. In *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, for example, the Court found an implied remedy for damages for violation of the duty placed upon defendant by the Safety Appliance Act. The case was tried to a jury.

In concluding that a jury trial was required in a suit seeking damages under the Labor-Management Reporting and Disclosure Act of 1959, the Fourth Circuit said in part:

> "The right asserted is indeed one created by statute, but we do not agree that a jury trial is necessarily unavailable because the suit for damages is one to vindicate a statutory right. There is no such cleavage between rights existing under common law and rights established by enacted law, where the relief sought is an award of damages." *Simmons* v. *Avisco, Local 713, Textile Workers Union*, 350 F. 2d 1012, 1018 (1965).

[22] "Thus innkeepers, who have nowhere been described as public utilities, have from early times been subject to the obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him." *Davies Warehouse Co.* v. *Brown*, 137 F.2d 201, 207 (Emerg. Ct. App. 1943), and cases there cited. *Davies* was reversed on other grounds, 321 U.S. 144.

See also *Thomas* v. *Pick Hotels Corp.*, 224 F.2d 664, 666 (10th Cir. 1955) (common law action against innkeeper for discrimination sounds in tort); 43 C.J.S. Innkeepers, § 9 at p. 1149.

that an applicant is an unfit tenant, when race is the real motivation is a species of defamation; libel and slander, of course, are common law causes of action. Discrimination might involve mental distress or other emotional harm, and the developing common law of torts recognizes a cause of action for the intentional infliction of emotional harm.[23] We thus conclude that a suit for damages for discrimination in the sale or rental of housing facilities is sufficiently analogous to a suit at common law to be appropriately characterized as a "legal" claim triable to a jury.

III.

Although the full implications of the Supreme Court's decision in *Ross* v. *Bernhard*, 396 U.S. 531, have yet to be determined, it is clear that mere analogy to history may not be sufficient to define the scope of the Seventh Amendment. In that case the constitutional right to a jury trial was held to encompass at least some claims in litigation which historically had been the exclusive province of equity. That was a derivative action brought by a shareholder in the name of a corporation. The shareholder's standing to litigate was governed by equitable principles; the corporate claim which he asserted was, at least in part, legal[24]

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[23] At common law, an inkeeper was liable in damages for insulting or abusing his guests or indulging in any conduct resulting in unnecessary physical discomfort or distress of mind. See *Odom* v. *East Avenue Corp.*, 178 Misc. 363, 34 N.Y.S. 2d 312 (1942), *affirmed*, 37 N.Y.S. 2d 491, 264 App. Div. 985 (complaint seeking damages against innkeeper for failure to serve guest in hotel restaurant because of race states common law cause of action). Professors Gregory and Kalven have suggested that the logic of the common law development of the dignitary tort might well apply in cases of racial discrimination. Gregory & Kalven, *Cases and Materials on Torts* 961 (2d ed. 1969). In addition, a racial discrimination suit might also be considered analogous to the so-called "new tort" for extreme and outrageous conduct which results in emotional harm. As to this "new tort," see *Eckenrode* v. *Life of America Ins. Co.*, ... F.2d .... (7th Cir. Aug. 3, 1972, No. 71-1103).

[24] "In the instant case we have no doubt that the corporation's claim is, at least, in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence. Under these circumstances it is unnecessary to decide

History was unquestionably relevant to the Court's analysis of the question whether a jury trial was required in such a case. But, following the lead set in *Beacon* and *Dairy Queen*, the traditional treatment of the entire litigation was subordinated to the traditional characterization of particular claims. Thus, the Court had "no doubt" that a claim for money damages predicated on breach of contract or gross negligence was legal in charcter.

This conclusion did not rest, as it might, simply on the fact that such a claim was enforceable at common law in England in 1791. Instead, the Court identified history as only one of three criteria that should be considered in determining the "legal" nature of an issue. The other two were: "second, the remedy sought; and, third, the practical abilities and limitations of juries."[25] Indeed, not only did the Court identify these two additional criteria; it also implied, without expressly stating, that history may be a less reliable guide than the other two.[26] We have already concluded that under an historical analysis a jury trial is required in the present case; we proceed to consider the other two criteria.

Under the second and third criteria identified in *Ross* v. *Bernhard*, the civil rights claim asserted in this case was certainly appropriate for determination by a jury. The relief sought was actual damages and punitive damages. Both the determination of the amount which would adequately compensate a litigant for an unliquidated claim and the punitive element of the award are appropriate for jury determination. As we have already discussed, juries historically have been required where the remedy sought was damages, either compensatory or punitive.

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[24] (Continued)

whether the corporation's other claims are also properly triable to a jury. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962)." 396 U.S. 531, 542-543.

[25] "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. *Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.*" 396 U.S. at 538 note 10. (Emphasis added.)

[26] In the preceding footnote we have emphasized the language which so implies.

The "practical abilities and limitations of juries" obviously present no obstacle to their determination of the issues presented in these civil rights cases. Typically, the facts are not complex and decision turns on appraisals of credibility and motive. Certainly such matters are far more suitable for jury determination than complicated commercial issues that routinely arise in derivative and antitrust litigation. Thus, the third as well as the second criterion identified in *Ross* v. *Bernhard* strongly militates in favor of recognition of the right to a jury trial in a case of this kind.

History indicates that a jury trial is required. And if the Supreme Court adheres to its identification of two additional criteria in *Ross* v. *Bernhard*, both the damage relief sought and the character of the issue to be tried compel the conclusion that the litigants are entitled to a jury.

IV.

The *Jones & Laughlin* holding that the Seventh Amendment is inapplicable to an N.L.R.B. proceeding terminating in the entry of an order directing reinstatement and awarding back pay was supported not only by the Court's characterization of the proceeding as statutory, but also by reference to chancery practice in which damages could be awarded as an element of complete equitable relief.[27] In this case the district court also regarded the relief authorized by the 1968 Act as primarily equitable and considered it appropriate to award damages as incident to such relief.

As the case developed, the defendant's right to demand a jury was not determined until after plaintiff's claim for equitable relief had been abandoned. Nevertheless, we share the district court's view that the right to a jury trial in this kind of case may properly be tested by the character of the relief requested in plaintiff's complaint. Our decision is not predicated on the special circumstance that only the damage claims remained when defendant's demand for a jury was denied.

[27] See quotation from the Court's opinion in footnote 15, *supra*.

At common law, a court of equity, in a proceeding properly before it, would hear and determine any legal issues incidental to the equitable issues and award any legal relief which might be incidental to equitable relief.[28] Multiplicity of suits could thus be avoided. And if equitable relief were no longer appropriate, the chancellor might nevertheless award damages or, in his discretion, permit the complaint to be amended to state only a legal claim which would then be triable to a jury.[29]

Today, however, legal and equitable issues can both be raised in one "civil action" under the Federal Rules. Thus, the avoidance of a multiplicity of suits and the desire to afford a complete remedy in one proceeding are no longer justifications for the "incidental" power of an equity court to award money damages. The right of the court, without a jury, to award "incidental" legal relief was nevertheless thought secure under the Federal Rules until the Supreme Court indicated differently in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, and *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469.

In *Beacon*, the Court upheld the petitioner's right to a jury trial of his counterclaim for treble damages under the antitrust laws which he had asserted in response to a complaint seeking, in part, equitable relief. In *Dairy Queen*, plaintiff sought injunctive relief against use of a trademark and an accounting to determine the amount due under a contract deemed breached. The district court held that the proceeding was either "purely equitable" or that any legal issues were "incidental" to the equitable issues. Mr. Justice Black, speaking for the Court, disposed of the "incidental" issue quite bluntly: "[N]o such rule may be applied in the federal courts."[30] Referring to *Beacon*, he wrote:

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[28] For purposes of our discussion of this "incidental to equitable relief" issue, we will assume, without deciding, that compensatory damages comparable to those sought herein might have been recovered in an 18th century chancery proceeding in which equitable relief appropriate when the suit was filed later became inappropriate.

[29] See generally 5 Moore's Federal Practice, ¶ 38.19[2]; 9 Wright & Miller, Federal Practice and Procedure, Civil § 2308, at pp. 42–43.

[30] 369 U.S. at 470. The complete sentence was:

"At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—based upon the view that the right to trial by jury may be lost

"The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances,' *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. There being no question of the timeliness or correctness of the demand involved here, the sole question which we must decide is whether the action now pending before the District Court contains legal issues."[31]

It would appear that *Beacon* and *Dairy Queen* have mandated that once any claim for money damages is made, the legal issue—whether defendant breached a duty owed plaintiff for which defendant is liable in damages—must be tried to a jury whether or not there exists an equitable claim to which the damage claim might once have been

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[30] (Continued)

as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts." *Ibid.*

[31] *Id.* at 472-473. Preceding the quotation in the text, the Court wrote: ". . . Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc.* v. *Westover*, ..." *Id.* at 472.

considered "incidental."[32] We therefore conclude that the right to a jury trial of a claim for damages under the Civil Rights Act of 1968 may not be denied on the ground that such damages are merely incidental to the prayer for injunctive relief.[33]

V.

Since the district court relied on several cases[34] holding

[32] "Since the decision of the Supreme Court in *Beacon Theatres, Inc.* v. *Westover*, and *Dairy Queen, Inc.* v. *Wood*, it is clear that there is a right to a jury trial on an issue of damages, whether they are pleaded independently, or as an incident to a request for an injunction." 5 Moore's Federal Practice ¶ 38.24[1] at p. 190.4. See also ¶ 39.19[2] at p. 172.1.

There is an equitable remedy of restitution which would not, of course, be eliminated by these decisions. In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, the Court recognized that in the government's suit for an injunction to enforce the Emergency Price Control Act of 1942, the government might recover overcharges as restitution. The Court thought the equitable remedy of restitution appropriate—even though not specified in the statute—because it was incidental to other equitable relief and because its use would be appropriate to the enforcement of the statute. But these were justifications for the awarding of relief concededly equitable. The statute also permitted a private suit for damages and a government suit for damages (in the nature of penalties as the Court described them); in either case the damages might be trebled. The Court noted that restitution "differs greatly from the damages and penalties which may be awarded." *Id.* at 402. These remedies were expressly identified as legal in nature, and hence a jury trial would have been required.

[33] It seems quite clear that the punitive damages in this case cannot be considered "incidental" to equitable relief. See note 44, *infra*. See also *Porter* v. *Warner Holding Co.*, 328 U.S. 395, in which the Supreme Court viewed the government's right to sue for damages under the Emergency Price Control Act of 1942 as an action at law for "penalties." *Id.* at 401–402. See also *United States* v. *Jepson*, 90 F. Supp. 863 (D.N.J. 1950). But *cf. United States* v. *Shaughnessy*, 86 F. Supp. 175 (D. Mass. 1949). The *Shaughnessy* court held that the government could recover statutory penalties along with an injunction under the Housing and Rent Act of 1947. One basis for the decision, that the damages could be considered "incidental" to equitable relief, is now obsolete in view of *Beacon* and *Dairy Queen*. The other basis was that the "damages sought are in the nature of a penalty when sued for by the United States, and this right to sue exists only where the tenant himself has failed to bring his action. It is essentially what would be an old action in equity and as such, is triable before a court without a jury." *Ibid.* Professor Moore is critical of this decision. 5 Moore's Federal Practice ¶ 38.37[1] at 307. The court failed to mention either the Supreme Court's decision in *Porter* or the general proposition that equity will not avoid damages penal in character. To the extent that it may have viewed the suit as one in equity because the government stood in the shoes of the individual tenant, *Ross* v. *Bernhard*, 396 U.S. 531 (discussed in the text, *supra*), has clearly eliminated that basis for denying a jury trial.

[34] See note 8, *supra*. See also *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Harkless* v. *Sweeny Independent*

that in an employee's suit for reinstatement and back pay under Title VII of the Civil Rights Act of 1964, the employer is not entitled to a jury trial, we should briefly indicate why we think the reasoning of those cases is inapplicable here.

First, insofar as the cases hold that back pay is a legal remedy which may be recovered as incidental to equitable relief, we believe they cannot stand in the face of *Beacon* and *Dairy Queen*.

Second, to the extent that they hold, relying on *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, that a jury trial is not required because the right vindicated is a statutory right, we reject the conclusion because it fails to differentiate between a statutory proceeding and the enforcement of a statutory right in an ordinary "civil action" in the courts.

Third, an acceptable rationale for awarding back pay in a non-jury judicial proceeding is consistent with our analysis of the damage claims asserted in this case. It is not unreasonable to regard an award of back pay as an appropriate exercise of a chancellor's power to require restitution.[35] Restitution is clearly an equitable remedy. As Professor Moore put it:

> "In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives."[36]

The retention of "wages" which would have been paid but for the statutory violation (of improper discharge) might well be considered "ill-gotten gains"; ultimate pay-

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[34] (Continued)

School District, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (no jury trial for back pay claim under 42 U.S.C. § 1983); *Culpepper* v. *Reynolds Metals Co.*, 296 F.Supp. 1232, 1239-1243 (N.D. Ga. 1968), *reversed on other grounds*, 421 F.2d 888 (5th Cir. 1970). *Cf.* Ochoa v. *American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972) (court writes in depth opinion contrary to these prevailing cases but follows circuit precedent in denying jury trial).

[35] This reasoning is applicable to 42 U.S.C. § 1983 as well since that statute authorizes not only "an action at law" but also a "suit in equity."

[36] 5 Moore's Federal Practice ¶ 38.24[2] at p. 190.5.

ment restores the situation to that which would have existed had the statute not been violated.[37]

The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses—tangible and intangible—which plaintiff has suffered by reason of a breach of duty by defendant. Such damages, as opposed to rent overcharges,[38] unpaid overtime wages,[39] or back pay, cannot properly be termed restitution.[40]

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[37] Similarly, rent overcharges might be termed "ill-gotten gains." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, discussed in note 32, *supra*. Attempts have been made to distinguish private actions and actions intended to correct an offense against the public interest, with the conclusion that a jury trial need not be afforded in the latter situation. In addition to the analytic difficulty with this public-private distinction, see Note, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167, 175-176, we fail to see how this makes any difference in the application of the Seventh Amendment. Whether a purely private wrong or a wrong somehow associated with the public interest is to be vindicated, if Congress chooses to permit its vindication by a "civil action" in the courts, it must respect the commands of the Seventh Amendment. Suits to collect statutory penalties —clearly suits brought to redress offenses against the public interest— have long been considered suits to collect a debt which are triable to a jury. See *Hepner* v. *United States*, 213 U.S. 103, and cases there cited. See also *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29; *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 510. This "public interest" concept might appropriately be used as a persuasive justification for the use of the equitable remedy of restitution. See *Porter* v. *Warner Holding Co.*, 328 U.S. at 402. The court in *Wirtz* v. *Jones*, 340 F.2d 901, 905 (5th Cir. 1965) referred to the fact that the suit was "to redress a wrong done to the public good" when it denied a jury trial in a suit by the government to enjoin violation of the Fair Labor Standards Act and to compel payment of withheld wages. However, the opinion makes it clear, citing as it does the *Porter* case, that the court was speaking of the equitable power to order restitution. If the remedy cannot fairly be characterized as restitution, however, the fact that the recovery sought is to redress a wrong done to the public good should not affect the right to a jury trial.

[38] *Porter* v. *Warner Holding Co.*, 328 U.S. 395. See note 32, *supra*.

[39] *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965). See note 37, *supra*. If, however, an employee rather than the government sues for back wages and liquidated damages under the Fair Labor Standards Act, the action is triable to a jury. See cases cited in *Wirtz* at p. 904. The employee's action is generally viewed as analogous to a common law action of debt or assumpsit. The liquidated damages available to an individual plaintiff would not be recoverable in equity as restitution. In any event, the same recovery available as restitution in equity might also be available in the common law action for general assumpsit. See 5 Moore's Federal Practice ¶ 38.24[2] at p. 190.5.

[40] One commentator's observation in the Title VII situation might apply equally well to other instances of restitution:

Whether or not the jury trial issue was correctly resolved in the back pay cases arising under the 1964 Act,[41] we are satisfied that they are not applicable to the question presented to us under the 1968 statute.

VI.

As the district court correctly emphasized, there are persuasive reasons for interpreting § 812 to authorize "the court" but not a jury to award damages to an injured party. When those words are used in connection with the allowance of fees, they clearly describe the judge rather than the jury[42] Therefore, it is argued that the same words in the clause providing that the "court" may award damages must also refer to the trial judge rather than the jury.

The argument is persuasive but not compelling. The "award" may refer to the entry of judgment by the court just as the amount which a plaintiff may "recover" in antitrust litigation is finally determined by the court's judgment rather than the verdict of a jury, which is unmentioned in the Clayton Act but is undeniably required if demanded by either party.

Other language in the statute implies, without expressly stating, that a jury's participation is appropriate. The statutory reference to "damages" and also to "punitive damages" would normally contemplate a jury verdict as an element of the judicial process leading up to the final

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[40] (Continued)

"However, it is important to note that the highly subjective questions of damages, which are often felt to be particularly appropriate for jury determination, are not present in Title VII cases. Back pay awards usually involve a definite amount for a definite period of time, and the total amount in controversy often can be stipulated by the parties. Most problems in determining the amount of a back pay award would be ones of computation rather than subjective evaluation." Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167, 173 (1969).

[41] We note the conflicting views expressed by Judge Noel in *Ochoa v. American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972), but we, of course, express no opinion on the issue since it is not before us.

[42] The proviso to subparagraph (c) states that the prevailing plaintiff shall be awarded fees if "said plaintiff in the opinion of the court is not financially able to assume said attorneys' fees." 42 U.S.C. § 3612(c).

award.[43] Certainly it is highly unusual for a federal statute to authorize a court to impose punishment, even if limited to $1,000, without according the defendant the right to a jury trial.[44]

The term "civil action" in legislation enacted since the merger of law and equity in 1938 is comparable to the words "action at law" or "suit in equity" which were used previously.[45] The words "action at law" implied a right to jury trial. The words "civil action," as *Beacon, Dairy Queen* and *Ross* make clear, do not in any sense imply that there is no right to a jury trial—a "civil action" asserting a legal claim is triable to a jury.

The legislative history of the 1968 act is silent on the question. There is no evidence that the proponents of the legislation expressed fear that the right to a jury trial would undermine the statute's effectiveness, or conversely, that opponents accepted any compromise in reliance on an assurance that juries could be demanded. The policy considerations which prompted the legislation probably favor a denial of the right; on the other hand, the more basic constitutional considerations which surround the

[43] Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e-5(g), provides for back pay but not for "damages" or "punitive damages."

[44] A court of equity would not enforce a penalty or forfeiture absent a specific statutory authorization. See *Livingston* v. *Woodworth*, 56 U.S. (15 How.) 546, 559-560; *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447, 453-454. (Except in admiralty, forfeiture cases are triable to a jury. *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 153; 5 Moore's Federal Practice ¶ 38.12[7], subdivision 1 at p. 135.) *Cf. Decorative Stone Co.* v. *Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir. 1928), *cert. denied*, 277 U.S. 594. Furthermore, it appears that the few cases which have held that a court may decide if punitive damages shall be awarded have all been patent cases in which a jury trial was available on the issues of infringement and actual damages and the court merely decided, pursuant to unequivocal statutory language, whether the damages should be increased (up to a maximum of three times the actual damages). See *Seymour* v. *McCormick*, 57 U.S. 480, 488-489; *Swofford* v. *B. & W., Inc.*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962; *Kennedy* v. *Lasko Co.*, 414 F.2d 1249 (3rd Cir. 1969). Those cases indicate that the jury shall determine the issue of actual damages; the latter two cases find that *Beacon* and *Dairy Queen* compel a jury trial on the actual damage question. It is one thing to permit a judge to increase the damage award after a jury trial in which a statutory violation has been found and actual damages awarded (the trial judge's right to set the amount of a fine in a criminal case *after* a jury trial on the factual issues is somewhat analogous); it is quite another thing to permit the imposition of punishment when there is no jury trial as an element of the judicial process leading up to that result.

[45] See 42 U.S.C. § 1983.

right to a jury as a protection against the over-zealous judge, point the other way. Nor, if the right to have a jury represent a fair cross section of the community and the desirability of broadening lay participation in judicial implementation of civil rights are kept in mind, can one assert that policy considerations unequivocally favor one view rather than the other.

In the end, we look to another canon of construction as controlling in this case. As Mr. Justice Holmes stated in *United States* v. *Jin Fuey Moy*: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." 241 U.S. 394, 401. See also *United States* v. *Campos-Serrano*, 404 U.S. 293.[*]

Even if our discussion of the Seventh Amendment is deemed inadequate to overcome an unambiguous statutory denial of a jury trial in an action to recover compensatory and punitive damages, there are certainly enough "grave doubts upon that score" that we should place an interpretation on the statute which will avoid the constitutional issue. We therefore hold that it was error for the district court to refuse defendants' request for a jury trial.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[*] And see *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 448-449:

"If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts, whether it would not be unconstitutional. No Court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution. . . ."

Judgment of the Court of Appeals, filed September 29, 1972

Before:

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and this cause be and the same is hereby REMANDED to the said District Court for further proceedings, in accordance with the opinion of this Court filed this day.